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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

MICHAEL CARRILLO, WARDEN, *Petitioner*,

v.

ADRIAN SALMON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal habeas corpus court may rely solely on its own circuit law, rather than on Supreme Court precedent, when determining whether a rule of law asserted by a state prisoner had earlier been "dictated by precedent" within the meaning of the "new rule" retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989).

2. Whether trial counsel has a Sixth Amendment duty to file a notice of appeal following a guilty plea in the absence of a request to do so by the defendant.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No.

MICHAEL CARRILLO, WARDEN, *Petitioner*,

v.

ADRIAN SALMON, *Respondent*.

OPINION BELOW[1]

Petitioner Michael Carrillo (the Warden) respectfully petitions for a writ of certiorari to review the November 13, 1998, decision of the United States Court of Appeals for the Ninth Circuit in *Salmon v. Carrillo*, No. 96-55707 [1998 WL 792290] [unpublished opinion] (Appendix A), reversing the district court and ordering the grant of habeas corpus relief to respondent Adrian Salmon, a prisoner in state custody pursuant to a judgment of conviction in the Superior Court of California.

The Warden has included the following orders and opinions as Appendices: (A) the Ninth Circuit's opinion in *Salmon v. Carrillo*; (B) the Ninth Circuit's unpublished denial of the warden's petition for rehearing with suggestion for rehearing en banc; and (C) the opinion of the magistrate adopted by the district court.

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1. This section contains the citations required by Rule 14(d) of the Rules of the Supreme Court of the United States.

Pursuant to Rule 12.7 of the Rules of the Supreme Court of the United States, petitioner will cite to or quote from the record, even though the record has not been transmitted to the Court.

STATEMENT OF JURISDICTION

The Ninth Circuit entered its judgment on November 13, 1998, and denied the Warden's petition for rehearing with suggestion for rehearing en banc on February 1, 1999. On February 11, the Ninth Circuit stayed the issuance of its mandate pending the filing of this certiorari petition. This Curt's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES, AND COURT RULES

Because of the length of the relevant constitutional provisions, statutes, and court rules, their pertinent text is set out in Appendix C. These authorities comprise: the Sixth Amendment to the United States Constitution; California Penal Code § 1237.5; California Penal Code § 1240.1; California Rule of Court 31(d); and California Rule of Court 470.

STATEMENT OF THE CASE

In July 1992, respondent Salmon pleaded guilty in Los Angeles County Superior Court Case No. NA-012016 to first degree (residential) burglary in violation of California Penal Code section 459. He also admitted that he had suffered a prior serious conviction. Supp. E.R. 124-130.[2/]

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2. "Supp. E.R." refers to petitioner's supplemental excerpts from the record, which were filed in the Court of Appeals pursuant to

The trial court denied probation and sentenced respondent to a total aggregate sentence of eleven years in state prison, consisting of six years for the burglary and a five-year enhancement for the prior conviction. Supp. E.R. 280-282.

Respondent failed to file a timely notice of appeal. He instead filed, in the California Court of Appeal, an application to file a belated notice of appeal. In March 1993, the state appellate court denied the application in an unpublished opinion. (People v. Salmon, No. B072408 (2d Dist.).) Supp. E.R. 165. Respondent then filed a petition for a writ of habeas corpus, in the same Court of Appeal, in which he alleged, among other things, ineffective assistance of trial counsel. The state appellate court "read and considered [it] together with a prior application for leave to file a belated appeal," and denied it in August 1993. Supp. E.R. 193. Ultimately, petitioner filed a petition for a writ of habeas corpus, in the California Supreme Court, again alleging ineffective trial counsel. The state supreme court denied that petition in November 1994.

In May 1995, respondent Salmon filed a petition for writ of habeas corpus in the United States District Court. (Salmon v. Carillo, No. CV-95-3554(DT).) He alleged that his trial lawyer had rendered unconstitutionally ineffective assistance in failing to advise him of his state appeal rights after his guilty plea. The federal magistrate at first recommended that a conditional writ of habeas corpus be granted unless the state court reinstated respondent's appeal. Supp. E.R. 74. After the Warden filed objections to the magistrate's report, Supp. E.R. 61, the magistrate then issued an amended report rejecting respondent Salmon's claim as one relying impermissibly on a "new rule" of law in violation of the *Teague v. Lane*

Ninth Circuit Rule 30-1.

retroactivity doctrine, and recommending that the petition be dismissed with prejudice instead. Supp. E.R. 8, 50. The district court adopted the conclusions and recommendations of the magistrate and ordered the petition dismissed with prejudice. Supp. E.R. 6.

Respondent filed a timely notice of appeal. Supp. E.R. 4-8. The district court denied respondent's request for a certificate of probable cause, Supp. E.R. 2; but, in November 1996, the Ninth Circuit granted him a certificate of appealability. Supp. E.R. 1. While the case was pending on appeal, a different panel of the Ninth Circuit issued a published opinion in *Ortega v. Roe*, 160 F.3d 534 (9th Cir. 1992). In *Ortega*, the Ninth Circuit held that its 1995 decision in *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995) -- holding that counsel's failure to file a notice of appeal without the defendant's consent after a guilty plea was per se reversible error -- did not amount to a "new rule" in Ortega's federal case, even though it post-dated the finality of Ortega's state criminal conviction. The *Ortega* panel reasoned that *Stearns,* instead, was "merely an application" of an earlier pre-finality rule announced in the Circuit's May 1992 non-guilty-plea case of *Lozada v. Deeds,* 964 F.2d 956 (9th Cir. 1992). The *Ortega* panel instructed the district court to issue a conditional writ releasing Ortega from state custody unless the state trial court vacated and reentered Ortega's judgment of conviction and allowed a fresh appeal less than two weeks later. (The State is filing a petition for writ of certiorari in *Roe v. Ortega.*)

On November 13, 1998, eleven days after the *Ortega* decision, the Ninth Circuit granted similar relief in respondent Salmon's appeal. In a three-paragraph unpublished order, the panel concluded that respondent's appeal was governed by *Ortega* and *Stearns* -- notwithstanding the Warden's *Teague*-based argument that invocation of either *Lozada* or *Stearns* in the context of the *Salmon* case would amount to an impermissibly

retroactive "new rule" -- and instructed the district court to issue a conditional writ of habeas corpus unless the state court vacated and re-entered the criminal judgment to allow respondent a fresh appeal. (Appendix A.)

The Warden's timely petition for rehearing with suggestion for rehearing en banc was denied on February 1, 1999. On February 11, 1999, the Ninth Circuit granted the Warden's motion for stay of issuance of the mandate to allow the filing of this petition.

REASONS TO GRANT THE WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

Certiorari should be granted in this case for two reasons. First, this case and *Ortega* conflict with United States Supreme Court authority, and other federal authority, on the issue of whether a federal court may rely solely on its own circuit precedents, rather than United States Supreme Court precedents, in determining whether a rule is "dictated by precedent" within the meaning of the non-retroactivity doctrine of *Teague v. Lane,* 489 U.S. 288 (1989). In *Ortega* -- and by extension in this case -- the Ninth Circuit relied only on its own pre-finality *Lozada* decision in determining that application of its subsequent post-finality *Stearns* rule was not *Teague*-barred. However, as shown below, it is United States Supreme Court precedent *alone* that determines whether a rule is "dictated by precedent" under *Teague* -- and certainly not merely the precedents of but one particular Circuit Court of Appeals. In this regard, the Ninth Circuit's decisions in this case and in *Ortega* -- and in other Ninth Circuit *Teague* cases as well -- conflict with United States Supreme Court authority (Rule 10(c)) and other federal circuit court authority (Rule 10(a)); and the conflict itself represents an important federal question implicating federal-state comity. Rule 10(a), (c).

Second, certiorari should be granted because the decision in this case, and in *Ortega,* conflict with other federal circuit court authority and California law on the issue of whether trial counsel is required to file a notice of appeal following a guilty plea in the absence of a request by the defendant. *Ortega* and *Salmon* follow *Stearns*, which held that it is ineffective assistance if that counsel's failure to file a notice of appeal after a guilty plea was without the defendant's consent. Other federal circuits have stated that counsel has no constitutional duty to file a notice of appeal in the absence of a request by the defendant. Likewise, California law does not require the filing of a notice of appeal unless (1) there are arguably meritorious grounds, or (2) the defendant so requests. Thus, the case at bar and *Ortega* conflict with other federal circuit authority (Rule 10(a)) and California law (*cf.* Rule 10(a) [conflict with state supreme court]). And, obviously, the issue of whether trial counsel is constitutionally required to file a notice of appeal after a plea, without a request, is an important federal question. Rule 10(a).

ARGUMENT

I.

THE NINTH CIRCUIT'S DECISIONS CONFLICT WITH THIS COURT'S PRECEDENTS, AND WITH OTHER FEDERAL PRECEDENTS, ON THE IMPORTANT QUESTION OF WHETHER THIS COURT'S OPINIONS, RATHER THAN A CIRCUIT'S OWN OPINIONS, DETERMINE THE AVAILABILITY OF A RULE OF LAW AS A BASIS FOR HABEAS CORPUS RELIEF UNDER THE TEAGUE V. LANE NON-RETROACTIVITY DOCTRINE

Ortega, and thus the opinion in this case, conflict with United States Supreme Court authorities and other federal circuit authority on an important, if not determinative, aspect of this Court's *Teague v. Lane* anti-retroactivity doctrine. These *Teague* authorities show that it is United States Supreme Court precedent -- not circuit court precedent in general and certainly not one particular circuit's precedents to the exclusion of all else -- that determines whether a proffered rule is "dictated by precedent" within the meaning of *Teague*. The Ninth Circuit in the case at bar and in *Ortega* erroneously relied only on its own circuit precedent in determining that a rule was not *Teague*-barred, and never even addressed whether this Court's precedents had dictated the rule of decision. *Ortega* -- and, necessarily, *Salmon* -- determined only that the Circuit's decision in *Stearns*, 68 F.3d 328, was not a "new rule" under *Teague* because it was "merely an application" of the Circuit's earlier rule in *Lozada*, 964

F.2d 956.[3] In this respect, the Ninth Circuit's exclusive emphasis on its own Circuit precedents in undertaking the *Teague* "new rule" inquiry is a problem that has grown well beyond the confines of the *Ortega* case and the case at bar. *See Dyer v. Calderon,* 151 F.3d 970 (9th Cir. 1998) (en banc) (deeming a rule not "new" under *Teague* because it had been adopted earlier in the Ninth Circuit); *Moore v. Calderon,* 108 F.3d 261 (9th Cir. 1997) (same).

A. United States Supreme Court Precedent on the *Teague* Question

The non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, prevents a federal court from granting habeas corpus relief to a state prisoner on the basis of a rule that had not been "dictated by precedent" in a very strict sense at the time the state conviction and sentence became final. Since *Teague*, this Court has demonstrated by its actions and by its words that it is United States Supreme Court precedent which determines whether a rule indeed had been "dictated by precedent" so that no reasonable jurist could have disagreed.

In *Teague* itself, this Court cited two examples of rules "dictated" by pre-existing precedent. Both were rules contained in holdings rendered by the United States Supreme Court itself. *Teague*, 489 U.S. at 301 (plur. op. of O'Connor, J.), citing *Rock v. Arkansas*, 483 U.S. 44, 62 (1987), and *Ford v. Wainwright*, 477 U.S. 399, 410 (1986);

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3. Respondent may attempt to argue that *Lozada* was merely applying United States Supreme Court precedent. However, in stating that prejudice would be presumed where counsel's failure to file was without the defendant's *consent* (as opposed to a failure to file despite the defendant's request), *Lozada* cited no United States Supreme Court authority, or authority of any kind. *Lozada*, 964 F.2d at 958.

see also id. at 301 (citing *Truesdale v. Aiken*, 480 U.S. 527, 528-29 (1987) (dissenting op. of Powell, J.) (stating that *Skipper v. South Carolina*, 476 U.S. 1 (1986), is a new rule). In rejecting the habeas petitioner's proffered constitutional rule applying a fair cross-section requirement to petit juries, moreover, the plurality opinion in the *Teague* case addressed only the United States Supreme Court's precedents of *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Akins v. Texas*, 325 U.S. 398, 403 (1945). 489 U.S. at 301.

Indeed, in the long line of this Court's *Teague* cases, lower-court authority has never driven this Court's analysis of whether a proffered rule had been "dictated" by precedent. In the twelve cases holding a rule would be "new" and therefore unavailable to a state prisoner, this Court invariably demonstrated that the proffered rule had not been dictated by its own precedents. *See Stewart v. Lagrand,* __ U.S. ___, ___, No. 98-1412 (March 3, 1999); *O'Dell v. Netherland,* 521 U.S. 151, 159-166 (1997); *Lambrix v. Singletary,* 520 U.S. 518, 527-538 (1997); *Gray v. Netherland,* 518 U.S. 152, 167-170 (1996); *Goeke v. Branch,* 514 U.S. 115, 119-120 (194) (per curiam); *Caspari v. Bohlen,* 510 U.S. 383, 391-393 (1994); *Gilmore v. Taylor,* 508 U.S. 333, 340-344 (1993); *Graham v. Collins,* 506 U.S. 461, 468-477 (1993); *Butler v. McKellar,* 494 U.S. 407, 414-415 (1990); *Sawyer v. Smith,* 497 U.S. 227, 234-238 (1990); *Saffle v. Park,* 494 U.S. 484, 489-494 (1990); *Teague,* 489 U.S. at 301; *accord Bousley v. United States,* 523 U.S. 614 (1998); *cf. Penry v. Lynaugh,* 492 U.S. 302, 329 (1989). In a much smaller subset of these twelve cases, in which were discussed federal or state cases adopting or rejecting a proffered rule on its merits, this Court in general referred to those cases only to confirm the subordinate point that such precedents had not adopted the proffered rule, see *O'Dell,* 521 U.S. at 166 n.3; *Lambrix,* 520 U.S. at 538; see *Caspari,* 510 U.S. at 393-396 ("the reasonable views of state courts are entitled to consideration along with those

of federal courts" in the *Teague* analysis); *see also Park,* 494 U.S. at 490-491, or that they had not done so unanimously, *see Caspari,* at 394; *Butler,* 494 U.S. at 415. Conversely, in the two instances in which this Court determined that a purported rule indeed had been "dictated by precedent," so as to make it available to a state prisoner in habeas corpus, this Court did not base its holdings on analyses of any prior precedents other than its own. *Penry,* 492 U.S. at 314-319; *Stringer v. Black,* 503 U.S. 222, 228-233 (1992).

Moreover, the *Teague* opinion also reflects additional authority to the effect that it is United States Supreme Court precedent which determines whether a rule is dictated by precedent. The *Teague* Court cited a prior concurring opinion by then-Justice Jackson in *Brown v. Allen*, 344 U.S. 443 (1953), for the proposition that state courts cannot anticipate "this Court's" due process requirements, *i.e.*, the Supreme Court's due process requirements. *Teague*, 489 U.S. at 310 (plur. op.). Thus, the *Teague* Court itself indicated that it is United States Supreme Court authority which determines whether a rule is "dictated by precedent." A passage from the comparatively recent case of *Lambrix*, 520 U.S. 518, also supports this view: the *Lambrix* majority stated that the *Teague* inquiry is applied to "Supreme Court decisions[.]" *Lambrix*, 117 S. Ct. at 1530. Similar references appear in other Supreme Court cases in the *Teague* line. *See, e.g.*, *Stringer,* 503 U.S. at 227 ("our inquiry is confined" to *Clemons* and *Maynard* [Supreme Court cases]); *Sawyer,* 497 U.S. at 235-236 ("our" Eighth Amendment cases and authorities); *Park,* 494 U.S. at 488 ("our prior cases"). The notion that Supreme Court cases determine the "new rule" question is inherent in the nature of the *Teague* rule itself: as *Lambrix* explained, unless a result is apparent to all reasonable jurists, *i.e.*, no other interpretation is reasonable, the result is not dictated by precedent. 117 S. Ct. at 1530.

In sum, only this Court's own precedents have proved determinative in this Court's prior inquiries into whether a rule is "new" for *Teague* purposes. There is no reason any federal court, in undertaking the same *Teague* inquiry into the objective reasonableness of the state court result, should identify the relevant legal landscape any differently. And there is certainly no reason why a lower federal court should exalt its own precedents, to the exclusion of others, in that inquiry.

Additional United States Supreme Court authority further supports the principle that the *Teague* inquiry into the relevant legal landscape, facing the state court at the earlier time of finality, is confined to Supreme Court jurisprudence. In *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991), the Ninth Circuit had stated in dicta that "[d]espite the authorities that take the view that the state courts are free to ignore decisions of the lower federal courts on federal questions, we have serious doubts as to the wisdom of this view." *Id.* at 736. However, in vacating the Ninth Circuit's later decision in that case, the Supreme Court characterized the circuit court's discussion of the binding effect of lower federal court decisions on state courts as "remarkable." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1064 n.11 (1997) (citing *Lockhart v. Fretwell*, 506 U.S. 364, 375-76 (1993) (conc. op., Thomas, J.) (Supremacy Clause does not require state courts to follow rulings of federal courts of appeals on questions of federal law)); *see Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992) (and cases cited); *see also Steffel v. Thompson*, 415 U.S. 452, 482 n.3 (1974) (Rehnquist, J., joined by Burger, C.J., concurring); *Perez v. Ledesma*, 401 U.S. 82, 125 (1971) (Brennan, J., joined by White and Marshall, JJ., concurring and dissenting).

Thus, the United States Supreme Court has recently supported the view that lower federal court authority is not binding on the state courts. Consequently, federal

circuit court authority cannot serve as the locus of precedent for the *Teague* "dictated by precedent" inquiry.

The Ninth Circuit's myopic approach in this case and in the *Ortega* case conflicts with United States Supreme Court authority on this point. Certiorari, therefore, should be granted.

B. Federal Circuit Court Authority on *Teague*

Two more recent federal circuit decisions support the Warden's position that, contrary to the Ninth Circuit approach in *Ortega* and the case at bar, lower federal court authority is not binding on the states: *Glock v. Singletary*, 65 F.3d 878, 885 (11th Cir. 1995) (federal appellate courts do not dictate rules to state courts for *Teague* purposes); and *Clemmons v. Delo*, 124 F.3d 944, 955 n.11 (8th Cir. 1997) (assuming, without deciding, that "firmly dictated by precedent" refers to United States Supreme Court precedent). But *see Jiminez v. Myers*, 40 F.3d 976, 979-81 (9th Cir. 1994).[4]

Further, this case and *Ortega* are inconsistent with federal appellate court decisions concluding that state courts are bound only by United States Supreme Court authority. *Bromley v. Crisp*, 561 F.2d 1351, 1354 (10th Cir.

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4. Respondent acknowledges that some other recent circuit court authority appears contrary to his position. *See O'Brien v. Dubois*, 145 F.3d 16, 23-24 (1st Cir. 1998), citing *Ciak v. United States*, 59 F.3d 296, 302-03 (2d Cir. 1995). However, upon closer examination, *Ciak* is not contrary to respondent's position. The *Ciak* court addressed whether *United States v. Levy*, 25 F.3d 146 (2d Cir. 1994), stated a new rule. In concluding that *Levy* did not state a new rule, the *Ciak* court noted that *Levy* relied on, inter alia, United States Supreme Court precedent. 59 F.3d at 303. Thus, *Ciak* does not support the proposition that circuit court authority can be controlling for *Teague* purposes. Moreover, for the reasons stated in this petition, petitioner submits that circuit precedent cannot establish a rule for *Teague* purposes. Further, this is especially true where, as here, there is a split of authority in the circuit courts.

1977); *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970) (and cases cited);[5] *Owsley v. Peyton*, 352 F.2d 804, 805 (4th Cir. 1965). Because these decisions conclude that state courts are bound only by United States Supreme Court precedent, they support the proposition that only United States Supreme Court precedent can "dictate" a rule for *Teague* purposes. Therefore, *Ortega* and the case at bar are inconsistent with these cases, too.

C. State Court Authority Indicates That Only Supreme Court Precedents Bind State Courts

Many state courts, including courts of last resort, have reached the conclusion that lower federal court authority is not binding on the states. The following listing is

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5. *United States ex rel. Lawrence v. Woods* was criticized by *Netzel v. United Parcel Service*, 165 Ill. App. 3d 685, 692-95, 520 N. E. 2d 665, 669-71, 117 Ill. Dec. 314, 318-20 (Ill. App. Ct. 1987). However, this criticism was based on a distinction between matters of federal constitutional law and matters of federal statutory interpretation which is not pertinent here. 165 Ill. App. 3d at 692-93, 520 N. E. 2d at 670, 117 Ill. Dec. at 319. The present case involves a matter of federal constitutional law. Even *Netzel* seems to acknowledge that lower federal court decisions are not binding on state courts as to matters of constitutional law, at least where there is a conflict between circuits. 165 Ill. App. 3d at 692, 520 N. E. 2d at 670, 117 Ill. Dec. at 319. Further, the *Netzel* decision was later reversed by the Illinois Supreme Court in a "supervisory order[.]" *Netzel v. United Parcel Service*, 181 Ill. App. 3d 808, 811, 537 N. E. 2d 1348, 1349, 130 Ill. Dec. 879, 880 (Ill. App. Ct. 1989). Finally, the Illinois Supreme Court seems to have adopted the view that Illinois courts are not bound by lower federal courts, at least where there is a split between the circuits. *People v. Bean*, 137 Ill. 2d 65, 114, 560 N. E. 2d 258, 280, 147 Ill. Dec. 891, 913 (Ill. 1990), citing *People v. Stansberry*, 47 Ill. 2d 541, 545, 268 N. E. 2d 431, 433 (Ill. 1971). *Stansberry* was overruled on other grounds in *People v. Laws*, 84 Ill. 2d 493, 497-98, 504, 419 N. E. 2d 1150, 1152-53, 1155-56, 50 Ill. Dec. 701, 703-04, 706-07 (Ill. 1981).

illustrative, but not comprehensive: *Weems v. Jefferson-Pilot Life Ins. Co., Inc.*, 663 So. 2d 905, 913 (Ala. 1995) (stating that prior decision[6] was not binding on whether Eleventh Circuit authority is binding on state; correct rule: state supreme court may rely on decision of any federal court, but is bound by United States Supreme Court); *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, 627 So. 2d 367, 373, n.1 (Ala. 1993); *People v. Avena*, 13 Cal. 4th 394, 431, 916 P.2d 1000, 1022, 53 Cal. Rptr. 2d 301, 323 (Cal. 1996);[7] *Blue Cross of California v. Superior Court*, 67 Cal. App. 4th 42, 56, 78 Cal. Rptr.2d 779, 788 (Cal. Ct. App. 1998), petition for review denied January 13, 1999 (California Court of Appeal not bound by lower federal court decisions construing Federal Arbitration Act); *Tully v. World Savings & Loan Assn.*, 56 Cal. App. 4th 654, 663, 65 Cal. Rptr. 2d 545, 550 (Cal. Ct. App. 1997); *Conner v. State*, 251 Ga. 113, 118, 303 S. E. 2d 266, 273 (Ga. 1983); *Bean*, 137 Ill. 2d at 114, 560 N. E. 2d at 280, 147 Ill. Dec. at 913 (citing prior Illinois Supreme Court case: Illinois courts not bound by lower federal courts);[8] *Greene v. State*, 11 Md. App. 106, 110, 273 A.2d 830, 833 (Md. Ct. Spec. App. 1971); *Planned Parenthood of New York City, Inc. v. State, Dept. of Institutions and Agencies*, 75 N.J. 49, 53, 379 A.2d 841, 842-43 (N.J. 1977) (New Jersey Supreme Court not bound by lower federal court decision invalidating state abortion statute); *State v.*

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6. *Ex parte Gurganus*, 603 So. 2d 903, 906 (Ala. 1992) (federal decisional law, interpreting a federal statute, is binding on Alabama Supreme Court).

7. *But see People v. Bradley*, 1 Cal. 3d 80, 86, 460 P.2d 129, 132, 81 Cal. Rptr. 457, 460 (Cal. 1969) (lower federal court decisions are persuasive and entitled to great weight).

8. At the time of the prior Illinois Supreme Court case, *Stansberry*, 47 Ill. 2d at 545, 268 N. E. 2d at 433, there was a split between the federal circuits on the matter at issue.

Glover, 60 Ohio App. 2d 283, 287, 396 N. E. 2d 1064, 1067 (Ohio Ct.App. 1978); *Cook v. Lilly*, 158 W. Va. 99, 101, 208 S. E. 2d 784, 786 (W. Va. 1974); *State v. Webster*, 114 Wis. 2d 418, 426 n.4, 338 N. W. 2d 474, 478 n.4 (Wis. 1983). *But see Handy v. Goodyear Tire & Rubber Co.*, 230 Ala. 211, 160 So. 530 (Ala. 1935) (circuit court's construction of federal statute held to be binding); *St. Cloud v. Leapley*, 521 N. W. 2d 118, 122 (S.D. 1994) (state courts are bound by federal decisions interpreting federal statute; citing cases); *Kuchenmeister v. Los Angeles & S.L.R.*, 52 Utah 116, 172 P. 725, 727 (Utah 1918).

Thus, substantial authority supports the conclusion that state courts are not bound by lower federal courts. If state courts are not bound by lower federal court authority, then lower federal court authority cannot be said to "dictate" precedent for *Teague* purposes. The case at bar, like *Ortega*, is inconsistent with this authority. Consequently, certiorari should be granted in *Ortega*, and in this related case, for this reason as well.

II.

THE NINTH CIRCUIT'S *ORTEGA* AND *SALMON* DECISIONS CONFLICT WITH CALIFORNIA LAW AND THE LAW OF OTHER CIRCUITS ON THE ISSUE OF WHEN DEFENSE COUNSEL MUST FILE A NOTICE OF APPEAL AFTER A GUILTY PLEA

There is, further, a split of federal circuit court authority on the issue of when defense counsel must file a notice of appeal following a guilty plea. The Ninth Circuit's decisions in *Ortega* and in the case at bar also conflict with California law on this matter. Consequently, certiorari should be granted in *Ortega* and in this case.

A. Split Of Federal Circuit Court Authority

There is a split of circuit court authority on the issue of when defense counsel has a duty to file a notice of appeal following a guilty plea. In *Stearns*, 68 F.3d at 330, the Ninth Circuit held that, even in a guilty plea case, a *federal* prisoner may obtain habeas relief merely by showing that he did not consent to counsel's failure to file a notice of appeal. Other circuit courts have stated that the defendant must ask his/her attorney to file a notice of appeal. *See, e.g., Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994) ("'[r]equest' is an important ingredient in this formula. A lawyer need not appeal unless the client wants to pursue that avenue[]"); *see also United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir. 1991); *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990). As the Sixth Circuit recently stated:

> We emphasize, of course, that a defendant's actual "request" is still a critical element in the Sixth Amendment analysis. The Constitution does not require lawyers to advise their clients of the right to appeal. Rather, the Constitution is only implicated when a defendant actually requests an appeal, and his counsel disregards the request. [Citations omitted.]

Ludwig v. United States, 162 F.3d 456, 459 (6th Cir. 1998).

Additional recent circuit court opinions have disagreed with *Stearns*. *Morales v. United States*, 143 F.3d 94, 96-97 (2d Cir 1998) (agreeing with *Castellanos*); *Fernandez v. United States*, 146 F.3d 148, 148-49 (2d Cir. 1998) (following *Morales*). The Fifth Circuit has also followed *Castellanos*. *United States v. Guerra*, 94 F.3d 989, 994 (5th Cir. 1996).[9]

Thus, many circuits have adopted a rule different from that of *Stearns*. This rule is supported by federal circuit court authority stating that, at least as of the time when respondent Salmon's case became final in 1992, there was not even a recognized federal constitutional duty to advise defendants of their appeal rights after a guilty plea. *See*, *e.g.*, *Marrow v. United States*, 772 F.2d 525, 528 (9th Cir. 1985) (federal defendants); *see also Belford v. United States*, 975 F.2d 310, 314-15 (7th Cir. 1992) (citing cases), overruled on other grounds in *Castellanos*, 26 F.3d at 720 (defendant need not show prejudice from failing to file an appeal); *Hardiman v. Reynolds*, 971 F.2d 500, 506 (10th Cir. 1992) (exceptions for answering inquiry and constitutional issues); *see also United States v. Lewis*, 880 F.2d 243, 246 (9th Cir. 1989) (after guilty plea, no grounds for direct federal appeal except sentence), abrogated on different grounds in

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9. *Guerra* did not address *Stearns*.

Lozada, 964 F.2d at 957.[10] Instead, federal habeas petitioners would have to show that they asked their attorneys to file a notice of appeal and that the attorneys failed to do so. Indeed, as noted, other federal circuit courts had stated that a defendant had to ask his or her attorney to file a notice of appeal. *See, e.g., Castellanos*, 26 F.3d at 719. Moreover, although their holdings were not so limited, *Ludwig*, *Fernandez*, *Morales*, *Guerra*, *Castellanos* and *Peak* involved defendants who pleaded guilty, as did respondent here. *Ludwig*, 162 F.3d at 457; *Fernandez*, 146 F.3d at 148; *Morales*, 143 F.3d at 94, 95; *Guerra*, 94 F.3d at 991; *Castellanos*, 26 F.3d at 718; *Peak*, 992 F.2d at 40.

The above-described split of authority between the Ninth Circuit panels in *Stearns, Ortega,* and *Salmon,* versus other circuits (as represented by *Castellanos*, *Peak*, *Davis*, *Abels*, *Ludwig*, *Morales*, *Fernandez*, and *Guerra*) militates toward granting certiorari in this case. Clearly, the rule as to when defense counsel must file a notice of appeal following a guilty plea is an important matter. Rule 10(a).

B. Conflict With California Law

The Ninth Circuit's *Ortega* decision, and the *Salmon* decision, also conflict with California law. California's legal landscape (at least as of January 1994) would not have required the filing of a notice of appeal. For example, a sentencing court was not required to advise a defendant of his/her appeal rights following a guilty plea. Cal. Rules of Court, Rule 470. This rule is still in effect. *See also People v. Serrano*, 33 Cal. App. 3d 331, 337-38, 109 Cal. Rtpr. 30, 33-34 (Cal. Ct. App. 1973) (no duty by

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10. Apparently, counsel still have no constitutional duty to advise federal defendants of their appellate rights. *Ludwig*, 162 F.3d at 459; *Morales*, 143 F.3d at 97 (quoting *Castellanos*, 26 F.3d at 719, with approval).

trial court to advise defendant of right to appeal after guilty plea). However, in a noncapital criminal case, where the defendant would be entitled to the appointment of counsel on appeal, the attorney representing the defendant at trial was under a duty to "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." Cal. Pen. Code § 1240.1(a).

Under Section 1240.1, defense counsel is required to file a notice of appeal only if there are arguably meritorious appellate issues or the defendant directs that an appeal be filed. § 1240.1(b). These statutory provisions are still in effect.

Petitioner submits that there do not appear to have been any arguably meritorious appellate issues in the present case. Petitioner's trial counsel submitted a sworn statement to the district court, stating "there was nothing" about petitioner's plea that indicated petitioner would have benefitted from advice regarding appeal rights, nor did counsel perceive any basis for appealing. Defense counsel further testified that, if respondent had expressed interest in an appeal, counsel would have informed him. E.R. 110. Thus, of that date, California law would not have required the filing of a notice of appeal in the present case. California law remains the same today. § 1240.1(b).

Accordingly, *Stearns* and *Ortega* -- and now *Salmon* -- have in effect declared Section 1240.1(b) of California Penal Code unconstitutional. They clearly conflict with California law on the issue of when defense counsel must file a notice of appeal following a guilty plea. This conflict also calls for a grant of certiorari.

Moreover, California has a rule requiring defendants to exercise personal diligence in ensuring that notices of appeal are filed. *Cf. In re Benoit*, 10 Cal. 3d 72, 88-89, 514 P.2d 97, 108, 109 Cal. Rptr. 785, 796 (Cal. 1973). The

judgment below and *Ortega* conflict with this decision, making a grant of certiorari necessary.

For all of the above reasons, a grant of certiorari is needed in *Ortega*, and in this case.

C. Additional Reasons For Reversing this Case

There are additional reasons for reversing the Ninth Circuit in this case and in *Ortega*: *Lozada* is distinguishable from *Stearns*; further, *Stearns* is distinguishable from the present case and was wrongly decided.

The Warden submits, as he argued below, that *Lozada* is distinguishable from *Stearns* and the present case. *Lozada* was not a guilty plea case. *Lozada v. State*, 110 Nev. 349, 350, 871 P.2d 944, 945 (Nev. 1994). In California, a guilty plea admits all matters essential to the conviction. *People v. DeVaughn*, 18 Cal. 3d 889, 895-96, 558 P.2d 872, 875, 135 Cal. Rptr. 786, 789 (Cal. 1977); *see also People v. Turner*, 171 Cal. App. 3d 116, 125-26, 214 Cal. Rptr. 572, 577 (Cal. Ct. App. 1985) (guilty plea waives right to raise questions regarding evidence). Indeed, California generally requires a certificate of probable cause for an appeal from a judgment following a guilty plea. § 1237.5; Cal. Rules of Court, Rule 31(d).

Further, Petitioner submits that *Stearns,* upon which *Ortega* relies, is distinguishable and was wrongly decided. *Stearns* is distinguishable because it involved a habeas action by a federal prisoner and did not involve California law as does this case. *Stearns,* 68 F.3d at 329. The present case involves an appeal from a state court judgment under state procedural rules specifically limiting trial counsel's duties with respect to filing a notice of appeal (*e.g.*, Cal. Penal Code § 1240.1(b)). Whatever merit the *Stearns* rule has in the federal context, it should not be extended to state court proceedings. In light of § 1240.1(b), it is difficult to understand how counsel could have had a duty to file a notice of appeal, let alone a duty

to file one just because respondent did not consent to the abandonment of his appeal.

Moreover, *Stearns* involved a complex sentencing scheme that precluded trial counsel from assuming that the defendant did not want to plead guilty. *Stearns*, 68 F.3d at 330. In the present case, there were no meritorious grounds for appealing respondent's sentence. (Supplemental Excerpts of Record, filed in the Ninth Circuit on March 25, 1998, at 43-44.) Thus, *Stearns* is distinguishable on this basis as well.

Further, *Stearns* was wrongly decided. As noted, in *Stearns* the Ninth Circuit stated that the issue was whether the defendant consented to the failure to file a notice of appeal, rather than whether counsel ignored an explicit request to file. *Stearns*, 68 F.3d at 330. However, other circuits have explicitly held otherwise and have required such a request be made. *See, e.g.*, *Castellanos*, 26 F.3d at 719. Petitioner submits that *Castellanos* states the better rule: under the *Stearns* rule, defense counsel will be forced to file a notice of appeal whenever a defendant fails to expressly forego an appeal, regardless of the circumstances and regardless of state law to the contrary (*e.g.*, California law).

Finally, if the *Ortega* decision stands every defendant who did not affirmatively consent to the abandonment of an appeal will now be free to assert a right to file a belated appeal, regardless of the amount of time since the conviction. This would even subject final judgments to challenge via habeas corpus petitions based on claimed lack-of-consent even though California law has never required an attorney to obtain consent before abandoning an appeal following a guilty plea. Indeed, the panel in the present case merely invoked *Ortega* in its brief order overturning petitioner's conviction.

For all of the foregoing reasons, this Court should grant certiorari.

CONCLUSION

Ortega and the case at bar conflict with United States Supreme Court authority, other federal circuit court authority, and state supreme court authority on the issue of whether United States Supreme Court precedent alone determines whether a rule is "dictated by precedent" for *Teague* purposes. Further, there is a split of federal circuit court authority on the issue of when defense counsel must file a notice of appeal following a guilty plea. *Ortega* and the instant case also conflicts with California law on this point. Accordingly, *Ortega* and this case represents an opportunity for this Court to resolve two important federal issues. For the reasons discussed above, petitioner respectfully requests that this Court grant the writ of certiorari and resolve the important issues of law presented herein.

Dated: March 11, 1999.

Respectfully submitted,

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Attorney General of the State of California
DAVID P. DRULINER
Chief Assistant Attorney General
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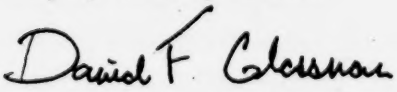

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Deputy Attorney General
Counsel of Record

Counsel for Petitioner

APPENDIX A

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADRIAN SALMON,	)No. 96-55707
	)
Petitioner-Appellant,	)D.C. No. CV-95-3554-DT
	)
v.	)M E M O R A N D U M[1/]
	)
Ernest C. Roe, Warden,	)
	)
Respondent-Appellee.	)
	)

Appeal from the United States District Court
for the Central District of California
Dickran Tevrizian, District Judge, Presiding

Argued and Submitted October 6, 1998
Seattle, Washington

Before: SKOPIL, REINHARDT, and GRABER, Circuit Judges.

Adrian Salmon pleaded guilty to first degree residential burglary in 1992. He is currently serving an eleven-year prison sentence and has petitioned for a writ of habeas corpus based on his attorney's failure to file a notice of appeal on his behalf.

In *United States v. Stearns*, 68 F.3d 328, 330 (9th Cir. 1995), we held that, even in cases where the judgment of conviction is entered pursuant to a guilty plea, defense counsel's failure to file a notice of appeal "automatically

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[1/] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

demand[s] reversal," unless the defendant consents to the abandonment of his appeal. In *Ortega v. Roe*, No. 97-17232 (November 2, 1998), this court held that *Stearns* did not announce a "new rule" for purposes of *Teague v. Lane*. *Stearns* therefore governs this case.

It is clear that Salmon did not consent to the abandonment of his appeal. It is also undisputed that Salmon's defense counsel failed to file a notice of appeal on his behalf. The district court is instructed to issue a conditional writ releasing Salmon from state custody unless the trial court vacates and reenters petitioner's judgment of conviction and allows a fresh appeal.
REVERSED and **REMANDED**.

APPENDIX B

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADRIAN SALMON,	)No. 96-55707
	)
Petitioner-Appellant,	)D.C. No. CV-95-3554-RAG
	)
v.	)O R D E R
	)
MICHAEL CARRILLO,	)
WARDEN, DANIEL E.,	)
ATTORNEY GENERAL	)
	)
Respondent-Appellee.	)
	)

Before: SKOPIL, REINHARDT, and GRABER, Circuit Judges

The panel has voted to deny the Appellees' petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. Pro. 35(b).

The Appellees' petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

APPENDIX C

APPENDIX C

FILED
CLERK, U.S. DISTRICT COURT
FEB. 28, 1996

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADRIAN SALMON, (SH)	) Case No. CV 95-3554-DT
Petitioner,	) AMENDED REPORT AND) RECOMMENDATION OF
vs.	) UNITED STATES) MAGISTRATE JUDGE
M. CARRILLO, WARDEN, WASCO STATE PRISON, DANIEL LUNGREN,	))))
Respondents.	)

This Amended Report and Recommendation is submitted to United States District Judge Dickran Tevrizian pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District court for the Central District of California.

I. Proceedings

Petitioner, in state custody, filed a petition for writ of habeas corpus on May 26, 1995. An Answer was filed on

June 20, 1995, followed by a Return on July 20, 1995. Petitioner filed a Traverse on August 9, 1995. The Magistrate Judge ordered a Supplemental Return, which was filed on October 19, 1995. On that date, the respondent also filed a copy of the transcript of proceedings w' :n petitioner entered his state court guilty plea.

Thereafter, the Court ordered respondent to address Lozada v. Deeds, 964 F.2d 956 (9th Cir. 1992), with respect to petitioner's claim that he was denied effective assistance of counsel because of his attorney's failure to advise him of his right to appeal. A second Supplemental Return was filed on December 26, 1995, and petitioner filed a Supplemental Reply on January 8, 1996. The matter was then taken under submission and a Report and Recommendation issued, recommending the petition be granted. Respondent filed Objections to the Report and Recommendation, which are addressed herein.

II. BACKGROUND

Petitioner pled guilty to first degree burglary in violation of California Penal Code §459. At the time of his guilty plea, petitioner did not waive any right to appeal. (Ex. B to Supp. Ret. filed 10/19/95). Petitioner was thereafter sentenced to a total term of 11 years in state prison, consisting of a 6 year base term and a 5 year enhancement pursuant to the provision of California Penal Code §667a. (Ret. Ex. A).

No timely Notice of Appeal was filed by or on behalf of petitioner. Petitioner's application to file a belated Notice of Appeal was denied by the California Court of Appeal. (Ret. Ex. B).

A Petition for Writ of Habeas Corpus, filed in the California Court of Appeal, was construed together with petitioner's application for leave to file a belated appeal, and was also denied. (Ret. Ex. C).

A Petition for Writ of Habeas Corpus, filed in the California Supreme Court was denied "for failure to allege sufficient facts". (Ret. Ex. D).

Petitioner thereafter filed a second petition in this Court entitled Salmon v. Mike Carrillo, Warden, CV 94-0630-DT (SH) which was dismissed without prejudice for failure to exhaust. (Pet. p. 5(a).)[12/]

Petitioner thereafter proceeded to file a second Petition for Writ of Habeas Corpus with the California Supreme Court, which petition was denied "on the merits." (Ret. Ex. E).

Petitioner then filed the current petition.

III. PETITIONER'S CONTENTIONS

Petitioner asserts four grounds in the instant petition.

First, petitioner alleges that he received ineffective assistance of counsel because counsel failed to file a formal Motion to Withdraw petitioner's guilty plea. Secondly, petitioner asserts he received ineffective assistance of counsel, because counsel failed to advise petitioner of his appeal rights and or appeal procedures.

Next, petitioner asserts that the trial judge abused his discretion in refusing petitioner's oral request to withdraw his guilty plea. Finally, petitioner asserts that the trial judge erred in failing to advise petitioner of his appeal rights. (Pet. at 6-7.

IV. DISCUSSION

Respondent has conceded that petitioner has exhausted his available state remedies. (Ret. at 6-7).

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12. This Court's records indicate petitioner also presented a habeas petition in Salmon v. Carrillo, CV 94-4399-DT (SH).

A. PETITIONER'S FIRST AND THIRD CLAIMS ARE WITHOUT MERIT

As to petitioner's first claim regarding his attorney's failure to file a Motion to Withdraw his guilty plea, such claim is reviewed according to the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). In order to prevail on most ineffective assistance of counsel claims, petitioner must show both that counsel's conduct fell below the threshold of objective reasonableness, and that there is a reasonable probability that the result would have been different were it not for counsel's errors. Lockhart v. Fretwell, 506 U.S. ___, 122 L.Ed.2d 180, ___ 113 S.Ct. 838 (1993).

Here, petitioner has failed to articulate any basis for a Motion to Withdraw his guilty plea. Though petitioner, at the time of sentencing, orally stated that he wanted to change his plea to not guilty the trial judge found that there was no formal motion nor were there declarations under penalty of perjury which could be construed as a Motion to Withdraw the guilty plea. Petitioner faults his attorney for not filing such a motion. (Ret.filed 7/20/95, Ex. B, pp. 27-29). Petitioner does not show that he was in any way prejudiced by the fact that no Motion to Withdraw the guilty plea was filed with the trial court. Petitioner has set forth no grounds for a Motion to Withdraw his plea, nor has he shown a probability that such a motion would have been granted. Accordingly, petitioner's first claim must fail.

Likewise, petitioner's third contention, that the trial judge abused his discretion in refusing petitioner's request to withdraw his guilty plea, must fail because petitioner fails to state a federal claim. Petitioner does not assert, in other than conclusory terms, that the oral Motion to Withdraw the plea was based on the plea not being voluntarily and intelligently entered.

Federal habeas relief may only be granted if the petitioner shows a violation of the federal constitution or federal laws. To the extent that petitioner appears to be raising a state law issue, such a decision was governed by the trial court's application of California Penal Code §1018, which provides the grounds for withdrawal of a guilty plea. Petitioner raises no allegation of a violation of federal constitutional rights.

B. PETITIONER'S SECOND CLAIM FOR RELIEF MUST ALSO FAIL

In the second ground, petitioner asserts that he received ineffective assistance of counsel because counsel failed to advise him of his appeal rights and appeal procedures, and that the trial judge also erred by failing to advise petitioner of his appeal rights.[13/]

It is clear from a reading of petitioner's attorney's Declaration that counsel never obtained petitioner's consent not to file a Notice of Appeal. (Ex. A to Supp. Return filed 12/26/95). Counsel declares that petitioner never gave any indication that he might want to invoke his appeal rights.

In Lozada v. Deeds, 964 F.2d 956, 958 (9th Cir. 1992), the Ninth Circuit held that prejudice is presumed under Strickland, supra, if it is established that counsel's failure to file a Notice of Appeal was without petitioner's consent. Lozada was a habeas petition filed by a petitioner in state custody, as is the instant case.

Respondent argues that Lozada is not controlling in the instant case, since petitioner entered a guilty plea, rather than being found guilty after trial, as was the petitioner in Lozada. Lozada held that prejudice is to be

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13. The alleged failure of the trial judge to advise petitioner of his right to appeal after his guilty plea does not raise a federal constitutional issue.

presumed if it is established that counsel's failure to file a Notice of Appeal was without the petitioner's consent. Although Lozada does not clearly distinguish between a conviction which results from a guilty plea, as opposed to a conviction after trial, Lozada arose in the context of an appeal following conviction after trial.

Respondent instead asserts that the instant case is governed by Marrow v. United States, 772 F.2d 525, 528 (9th Cir. 1985). Marrow predated Lozada by seven years, and involved a Section 2255 petition. Marrow held that there was no duty, in all cases, to advice a defendant of the right to appeal a conviction after a guilty plea, but that instead counsel is obligated to give such advice only when the defendant inquires about appeal rights or when there are circumstances present which indicate the defendant may benefit from receiving such advice.

The Ninth Circuit recently addressed, and rejected, any possible distinction between appeals after guilty pleas and appeals after trial in United States v. Stearns, 68 F.3d 328 (9th Cir. 1995).

Relying on Lozada, supra, and United States v. Horodner, 993 F.2d 191, 194 (9th Cir. 1993), the Stearns Court noted that judgment was entered after a plea rather than after a trial. The Court stated: "That, however, is a distinction without a difference. We see no principled way to distinguish a failure to file a Notice of Appeal after a judgment following a plea from a failure to file after a judgment following a trial. It is true that in the latter situation there may well be more issues to raise on appeal, but that is a factor of no real importance." 68 F.3d 328 at 330.

Although Stearns held that prejudice is to be presumed under Strickland if an attorney fails to file a Notice of Appeal without the petitioner's consent, even after a guilty plea, Stearns cannot be applied in this habeas matter, due to application of Teague v. Lane, 489 U.S. 288 (1989). Teague held that a "new rule" cannot be

applied retroactively on habeas unless the new rule falls into two narrow and inapplicable exceptions.[14/]

While Stearns did not actually announce a "new" rule, it nevertheless applied the rule of Lozada in a novel setting (i.e. the duty of counsel to appeal after a guilty plea.) Since petitioner could obtain habeas relief only by applying Lozada to his own novel setting, (or by reliance on Stearns), for this Court to apply Stearns on habeas would be violative of Teague, supra. Stringer v. Black, 503 U.S. 222, 117 L.Ed.2d 367 (1992).

Petitioner's conviction became final in April, 1993, when the California Court of Appeal requested to file a belated Notice of Appeal. At that time, the California courts were not compelled to have granted petitioner, who pled guilty, relief by reliance on Lozada.

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14. The two exceptions are discussed in Harmon v. Marshall, 57 F.3d 763, 765 (9th Cir. 1995).

RECOMMENDATION

WHEREFORE IT IS RECOMMENDED that the petition be dismissed with prejudice.
DATED: 2/28/96

STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing the Duties of the Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

LODGED
CLERK, U.S. DISTRICT COURT
FEB. 28, 1996

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADRIAN SALMON, (SH)	) Case No. CV 95-3554-DT
Petitioner,	) ORDER ADOPTING) AMENDED REPORT AND
vs.	) RECOMMENDATION OF) UNITED STATES
M. CARRILLO, WARDEN, WASCO STATE PRISON, DANIEL LUNGREN,	) MAGISTRATE JUDGE
Respondents.	)

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Amended Report and Recommendation of the United States Magistrate Judge, and has made a de novo determination of the Amended Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that the Petition filed herein is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by the

United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.
DATED: _____

_____
DICKRAN TEVRIZIAN
UNITED STATES DISTRICT JUDGE

LODGED
CLERK, U.S. DISTRICT COURT
FEB. 28, 1996

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PROPOSED

ADRIAN SALMON,) Case No. CV 95-3554-DT (SH)
)
Petitioner,) JUDGMENT
)
vs.)
)
M. CARRILLO,)
WARDEN, WASCO)
STATE PRISON,)
DANIEL LUNGREN,)
)
Respondents.)
_____)

Pursuant to the Order of the Court adopting the conclusions and recommendations of the United States Magistrate Judge,

IT IS ADJUDGED that the Petition for Writ of Habeas Corpus is dismissed with prejudice.

DATED: _____

_____
DICKRAN TEVRIZIAN
UNITED STATES DISTRICT JUDGE

APPENDIX D

APPENDIX D

The Text of Pertinent Constitutional Provisions, Statutes, and Court Rules:

(1) Sixth Amendment, United States Constitution
(2) California Penal Code § 1237.5
(3) California Penal Code § 1240.1
(4) California Rules of Court, Rule 31(d)
(5) California Rules of Court, Rule 470

The Sixth Amendment to the United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

California Penal Code § 1237.5 provides:

No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met:

(a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk.

This section shall become operative on January 1, 1992.

California Penal Code § 1240.1 provides, in pertinent part:

(a) In any noncapital criminal, juvenile court, or civil commitment case wherein the defendant would be entitled to the appointment of counsel on appeal if indigent, it shall be the duty of the attorney who represented the person at trial to provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal. The attorney shall admonish the defendant that he or she is not able to provide advice concerning his or her own competency, and that the State Public Defender or other counsel should be consulted for advice as to whether an

issue regarding the competency of counsel should be raised on appeal. The trial court may require trial counsel to certify that he or she has counseled the defendant as to whether arguably meritorious grounds for appeal exist at the time a notice of appeal is filed. Nothing in this section shall be construed to prevent any person having a right to appeal from doing so.

(b) It shall be the duty of every attorney representing an indigent defendant in any criminal, juvenile court, or civil commitment case to execute and file on his or her client's behalf a timely notice of appeal when the attorney is of the opinion that arguably meritorious grounds exist for a reversal or modification of the judgment or orders to be appealed from, and where, in the attorney's judgment, it is in the defendant's interest to pursue any relief that may be available to him or her on appeal; or when directed to do so by a defendant having a right to appeal.

With the notice of appeal the attorney shall file a brief statement of the points to be raised on appeal and a designation of any document, paper, pleading, or transcript of oral proceedings necessary to properly present those points on appeal when the document, paper, pleading or transcript of oral proceedings would not be included in the normal record on appeal according to the applicable provisions of the California Rules of Court. The executing of the notice of appeal by the defendant's attorney shall not constitute an undertaking to represent the defendant on appeal unless the undertaking is expressly stated in the notice of appeal.

If the defendant was represented by appointed counsel on the trial level, or if it appears that the defendant will request the appointment of counsel on appeal by reason of indigency, the trial attorney shall also assist the defendant in preparing and submitting a motion for the appointment of counsel and any supporting declaration or affidavit as to the defendant's financial

condition. These documents shall be filed with the trial court at the time of filing a notice of appeal, and shall be transmitted by the clerk of the trial court to the clerk of the appellate court within three judicial days of their receipt. The appellate court shall act upon that motion without unnecessary delay. An attorney's failure to file a motion for the appointment of counsel with the notice of appeal shall not foreclose the defendant from filing a motion at any time it becomes known to him or her that the attorney has failed to do so, or at any time he or she shall become indigent if he or she was not previously indigent.

California Rule of Court 31, provides, in pertinent part:

(d) [Guilty or nolo contendere plea] If a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. Within 20 days after the defendant files the statement the trial court shall execute and file either a certificate of probable cause or an order denying a certificate and shall forthwith notify the parties of the granting or denial of the certificate.

If the appeal from a judgment of conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds (1) occurring after entry of the plea which do not challenge its validity or (2) involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code, the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds.

The time for preparing, certifying, and filing the record on appeal or for filing an agreed statement shall begin when the appeal becomes operative.

California Rule of Court 470, provides:

After imposing sentence or making an order deemed to be a final judgment in a criminal case upon conviction after trial, or after imposing sentence following a revocation of probation, except where the revocation is after the defendant's admission of violation of probation, the court shall advise the defendant of his or her right to appeal, of the necessary steps and time for taking an appeal, and of the right of an indigent defendant to have counsel appointed by the reviewing court. A reporter's transcript of the proceedings required by this rule shall be forthwith prepared and certified by the reporter and filed with the clerk.

Supreme Court, U.S.
FILED
APR 12 1999
CLERK

No. 98-1473

In The

Supreme Court of the United States

October Term, 1998

MICHAEL CARRILLO, WARDEN,

Petitioner,

v.

ADRIAN SALMON,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In July 1992 respondent was arrested and charged with burglary. (SER 119[1]). The state trial court appointed attorney Ted Batsakis to represent respondent. On September 30, 1992, respondent in open court entered into a plea agreement. (SER 124).

Only two weeks later, at the sentencing hearing on October 14, 1992, the court asked Mr. Batsakis whether he wished to make a statement. (SER 277). Mr. Batsakis responded, "Your Honor, I believe the defendant wants to address the court." Respondent then stated, "I want to change my plea, please, to not guilty." In response, the judge asked, "Did you want to say anything, Mr. Batsakis." (SER 277). "No," he answered.

The court then turned to respondent and asked, "What did you want to say, Mr. Salmon?" (SER 277). Respondent attempted to tell the court his reasons for requesting the plea withdrawal:

> Well, because on [sic] the first place the day I was arrested, I was under the effects of drugs. And I asked my attorney to get me a psychiatrist. And he said he couldn't do that. And afterwards, I was offered a deal for seven years, and I was going to take it because I didn't know if I was guilty or not. And for the last time, because my wife is ill, and then after I said that, then he said there was no seven-year deal. I would like to have about a month's time to see if I can get an attorney and to fight my case. And if I could see a psychiatrist.

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[1] The abbreviation "SER" refers to the Supplemental Excerpts of Record filed by petitioner in the Ninth Circuit.

(SER 277). It appears from the transcript that respondent in fact gave his account in Spanish, which was then translated as set out above. (SER 276).

The judge interrupted respondent and noted: "There is no formal motion before this court by you or your attorney. There is [sic] no declarations under penalty of perjury. There is nothing for me to rule on to consider setting aside your plea." (SER 278). He concluded that he would continue with the sentencing, but added:

> [K]nowing that a judge can change his sentencing within sixty days after I do [sic] it, if there is a formal motion between now and the next reasonable length of time, I will consider whether I will reopen both the sentencing and/or have a motion regarding whether you should be allowed to withdraw your plea.

(SER 278). Despite this specific instruction by the court and his client's clear request, Mr. Batsakis never filed a motion to withdraw the guilty plea. Moreover, neither petitioner nor Mr. Batsakis have offered any explanation for Mr. Batsakis' failure to argue in support of his client during the sentencing hearing when respondent attempted to make this *pro se* oral motion.

Following respondent's unsuccessful attempt to withdraw his guilty plea, the judge sentenced respondent to the maximum sentence he could have received had he gone to trial and been convicted: 11 years minus 159 days credit for time served. (SER 282). After sentencing, Mr. Batsakis concededly did not advise respondent that he could appeal or that he would be entitled to counsel if he wished to appeal; Mr. Batsakis himself, without respondent's consent, did not file an appeal. (SER 99 & 110).

Acting without the assistance of counsel, respondent attempted in vain to appeal on his own. Respondent evidently never saw or had further contact with Mr. Batsakis following

the October 14, 1992 sentencing hearing. (SER 95). In late November 1992, acting *pro se*, respondent sent a timely notice of appeal to the Los Angeles Superior Court. (Add. 8[2]). By that point in time respondent was incarcerated at the Wasco State Prison, some 140 miles from Los Angeles.

Court records indicate that respondent's notice of appeal was received on December 10, 1992, but was deemed incomplete because it did not contain certain allegations required under Section 1237.5 of the California Penal Code. (Add. 5). Respondent was notified by the court that "[n]o further action will be taken until such time as you comply with Section 1237.5 Penal Code." (Add. 5). Despite the fact that this initial notice of appeal was submitted *pro se*, the state court neither took steps to provide respondent with counsel nor indicated to him that counsel would be appointed at his request.

In February 1993 respondent filed a second notice of appeal with the superior court. (Add. 4). This second notice of appeal expressly requested that the court appoint counsel to represent respondent.[3] On March 25, 1993, the state court rejected that appeal as untimely, asserting that "[a] thorough search of the case file indicates that no appeal was received before this one in February 1993. Since this appeal is untimely, relief must be sought from the Court of Appeal." (Add. 2). Quite inexplicably, both this document, reciting that the file contains no record of respondents' December 1992 notice of appeal, and the record of that very notice of appeal are in respondent's superior court file. (Add. 1-8). Respondent then attempted to file a belated notice of appeal,

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[2] The abbreviation "Add." refers to the Addendum to respondent's Supplemental Opening Brief in the Ninth Circuit.

[3] "Please be advised that I cannot proceed with this appeal in Pro Per. If possible, a bilingual counsel would be preferable since I don't read nor speak English in order to understand my rights under due process." (Add. 4).

but the California Court of Appeals, Second Appellate District, Division 3, denied his application. (SER 165).

Respondent next filed a Petition for Writ of Habeas Corpus in the California Court of Appeals. (SER 194). The Court of Appeals denied the petition on August 26, 1993. (SER 193). On May 25, 1994, the California Supreme Court denied respondent's Habeas Corpus Petition for failure to allege sufficient facts (SER 204); on November 30, 1994, that court denied on the merits a second petition filed by respondent. (SER 218). No state court ever held a hearing on these claims or addressed the factual issues that they present.

On May 26, 1995, respondent filed a *pro se* Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California. (SER 263). Petitioner responded by filing an answer and original and supplemental returns with supplemental memoranda. (SER 103, 114, & 144). Respondent filed a traverse to the return, a supplemental reply with declaration, supplemental memoranda of points and authorities for each reply, and a supplemental exhibit. (SER 86, 93, & 133).

The magistrate judge, on February 5, 1996, issued a Report and Recommendation to the district court suggesting that respondent's petition be granted. (SER 74). Petitioner filed objections to this Report and Recommendation on February 21, 1996. (SER 61). On February 28, 1996, the magistrate judge issued an Amended Report and Recommendation, suggesting that the petition be dismissed. (SER 50). On March 13, 1996, respondent filed objections to the magistrate judge's Amended Report. (SER 42). On the same day, the magistrate judge issued a Final Report and Recommendation suggesting that the petition be dismissed with prejudice. (SER 8). On March 18, 1996, the district court adopted the magistrate's Final Report and Recommendation and dismissed the petition. (SER 6).

In October 1997 the Ninth Circuit appointed the undersigned counsel for respondent, together with three then students at the University of Washington School of Law, to represent respondent on appeal. In the Ninth Circuit, respondent raised a number of issues, including the denial of the assistance of counsel to pursue a direct appeal. On November 13, 1998, the Ninth Circuit reversed the district court on that ground and ordered that respondent be released unless the State of California vacated and reentered the judgment against respondent so that he could take a fresh appeal.

REASONS FOR DENYING THE WRIT

The proceedings in the Ninth Circuit involved two distinct issues: *first*, whether respondent was denied the effective assistance of counsel and, *second*, whether that constitutional violation should be deemed prejudicial. By weaving together elements of these two separate issues, the petition artfully suggests that the Ninth Circuit's decisions in the instant case and in *Ortega v. Roe*, 160 F.3d 534 (9th Cir. 1998), *petition for cert. filed*, No. 98-1441 (U.S. Mar. 4, 1999), present a question warranting review by this Court. If, however, those issues are analyzed separately (as they are below), it is apparent that neither the instant case nor *Ortega* warrants review.

I. The Ninth Circuit's Finding That Respondent Was Denied Effective Assistance Of Counsel Presents A Fact-Bound And Relatively Uncommon Dispute.

The Ninth Circuit's decision in this case involves a fact-bound and unremarkable application of the long-standing principle that indigent criminal defendants are entitled to the effective assistance of counsel on direct appeal. *Douglas v. California*, 371 U.S. 353 (1963). Although the indigent respondent was, at least to some degree, represented by court-

appointed counsel at the trial court level, it is undisputed that respondent was not provided with counsel when he ultimately attempted to appeal. The threshold issue is whether respondent was unconstitutionally denied such counsel or, rather, whether the lack of counsel occurred because respondent failed to make an appropriate request for such representation.

The particular factual setting in which this issue has arisen here, as in *Ortega*, is fairly uncommon. Ordinarily criminal defendants are advised by their attorney, or by the court in the presence of counsel, of their rights to appeal and to representation by counsel on appeal. Claims that a defendant was denied the assistance of counsel to pursue an appeal typically fall into one of three categories: (a) if a defendant indicates that he wishes to appeal, a failure of his attorney to pursue such an appeal will violate the defendant's rights (*see Rodriquez v. United States*, 395 U.S. 327 (1969)); (b) if the defendant instructs the attorney not to appeal, that attorney's inaction obviously will not violate the defendant's Sixth Amendment rights (*see Peguero v. United States*, __ U.S. __, 119 S. Ct. 961, 67 U.S.L.W. 4154 (1999)); and (c) if at the end of the trial court proceedings a defendant well aware of his rights to appeal and to representation on appeal meets with his attorney and does not express an interest in exercising those rights, it will ordinarily be reasonable to infer that the defendant has chosen not to exercise them (and, of course, such an inference would be all the stronger in a case in which a defendant earlier agreed to a plea bargain and has indicated no objection to, or during, the proceedings that followed that agreement).

The particular circumstances of this case differ from these more common situations. The Ninth Circuit properly concluded here that "Salmon did not consent to the abandonment of his appeal." (Pet. App. A-2). That determination of non-consent is well supported by the record

in this case and, for each of the reasons set out below, does not warrant review by this Court.

First, it is undisputed here that respondent's trial court attorney violated state law, which specifically required that he "provide counsel and advice as to whether arguably meritorious grounds exist for reversal or modification of the judgment on appeal." Cal. Penal Code § 1240.1(a). Had such guidance been provided, respondent would have understood his appeal rights at a point when he could have directly indicated to his attorney that he wanted to appeal. In fact, no such opportunity ever arose: respondent claims that after the sentencing proceeding he had no further contact with his trial attorney, and petitioner asserted in the Ninth Circuit only that there was a brief conversation about the appointment of another attorney to file a motion in the trial court. (SER 12-14; Appellees' Supplemental Brief at pp. 12-14). In this Court petitioner insists that the trial court attorney had concluded that no basis existed for an appeal. (Pet. 19). Petitioner has never argued (and cannot argue), however, that Mr. Batsakis ever discussed that conclusion, or anything else related to the possibility of appeal, with respondent.[4]

Second, there is no claim here that when this matter was in the trial court respondent understood what, if any, right to appeal might exist under state law. As petitioner himself stresses, California law imposes significant restrictions on what issues can be raised on appeal following a guilty plea. (Pet. 20). A layman could not be expected to know whether any grievance he might have had with the trial court proceedings would be cognizable on appeal; such understanding was all the more unlikely in the case of

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[4] Mr. Batsakis so testified. In a declaration submitted by petitioner in this case, Mr. Batsakis explained: "there was nothing about Mr. Salmon's plea that indicated to me he would benefit from advice regarding his appeal rights." (SER 110-11).

respondent, whose English skills were so limited that he required the assistance of a translator in the state court proceedings and certainly could not be expected to understand the complexities of California law.

Third, when this case was still pending at the trial court level, respondent expressed vociferous objection to the result of those proceedings. With his attorney inexplicably silent, respondent personally advised the state judge that he wanted to withdraw his guilty plea and attempted to advance arguments as to why he should be permitted to do so. (SER 277). These objections ended not because respondent was mollified but because the trial judge insisted that the arguments be part of a formal motion—a motion that respondent's trial counsel inexplicably failed to file. These circumstances negate any possibility that respondent did not want to appeal because he was satisfied with the result of the trial court proceedings.

Petitioner does not contend that respondent actually chose not to appeal or in fact opted to waive his right to the assistance of counsel on appeal. Rather, petitioner's objection is to what it claims is a general rule—assertedly adopted in *United States v. Stearns*, 68 F.3d 328 (9th Cir. 1995)—that requires a defense counsel to file an appeal from a guilty plea in any case in which a defendant has not "affirmatively" and "expressly" instructed the attorney not to appeal. (Pet. 21). The actual decision in *Stearns*, however, does not use the terms "affirmatively" or "expressly"; it requires only that a defendant "consent" to the action of an attorney in not pursuing an appeal. 68 F.3d at 330. Nothing in *Stearns* purports to detail *how* a defendant's consent need be expressed or might be ascertained; under *Stearns* there could assuredly be cases in which a defendant's silence or inaction clearly indicated such consent. This simply is not such a case.

Nor does the Ninth Circuit's decision conflict with California law. (Pet. 18-20). As previously noted, state law expressly requires defense counsel to advise their clients about

their appeal rights (Cal. Penal Code § 1240.1(a)); once that has been done, the lack of a request for an appeal would ordinarily indicate that the defendant did not wish to appeal, fully satisfying the terms of both state law and *Stearns*. The Ninth Circuit's decision does not "in effect" declare Section 1240.1 unconstitutional; to the contrary, the constitutional problem in this case arose precisely because that provision of California law was violated.

Petitioner's assertion that there is a conflict among the circuits is similarly overstated. On the one hand, the Ninth Circuit has not adopted the "express affirmative consent" rule of which petitioner complains. No Ninth Circuit decision (or district court decision within the Ninth Circuit) construes *Stearns* in that manner. On the other hand, the decisions in other circuits did not involve, and do not purport to address, the somewhat atypical circumstances of this case and *Ortega*. Thus, for all these reasons, the Ninth Circuit's finding that respondent was denied effective assistance of counsel on appeal does not warrant this Court's review.

II. The Ninth Circuit's Finding Of Presumed Prejudice Is Consistent With Seven Other Circuits And With The Decisions Of This Court And Thus Raises No Significant Issue Under *Teague v. Lane*.

The Ninth Circuit also held in this case that where a habeas petitioner has been denied his constitutional right to counsel on appeal prejudice will be presumed and the petitioner is thus not required to demonstrate that he would probably have prevailed had he had the assistance of counsel to pursue such an appeal. This aspect of the Ninth Circuit's decision, unlike the fact-bound dispute discussed above, indeed presents a question of law. But the Ninth Circuit's decision is consistent with similar decisions in seven other circuits and is entirely consonant with the decisions of this Court.

This aspect of federal law is largely controlled by a long series of decisions of this Court, dating from the Court's 1969 decision in *Rodriquez*. *See Penson v. Ohio*, 488 U.S. 75, 88 (1988); *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Chapman v. California*, 386 U.S. 18, 23 and n.8 (1967).[5] The petitioner in *Rodriquez* asserted that his trial counsel had refused to file an appeal, despite having assured his client that he would do so. The Ninth Circuit denied relief under Section 2255, reasoning that the petitioner had failed to show "some likelihood of success on [the original] appeal." 395 U.S. at 330. In reversing, this Court noted the long-standing rule that an indigent defendant is entitled on direct appeal to appointment of counsel without the need to make any showing about the likelihood of success on the merits. 395 U.S. at 330. Habeas petitioners asserting that they had been denied the assistance of counsel on direct appeal, the Court reasoned, should not be subjected to a requirement they would not have faced had the original constitutional violation never occurred. Rather, "[t]hose whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." 395 U.S. at 327.

Two decades later, in *Lozada v. Deeds*, 498 U.S. 430 (1991), the Ninth Circuit repeated the same error it had

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[5] *See also Peguero*, 67 U.S.L.W. at 4156 ("In *Rodriquez*, we held that when a defendant's failure to appeal a conviction is attributable to an error by his lawyer, the defendant is entitled to collateral relief without requiring him to show that his appeal would have had merit.") (O'Connor, J. concurring). At the oral argument in *Peguero*, the United States characterized *Rodriquez* in a similar manner. *See* 1999 WL 20679 at p. 10 ("This Court's decision in *Rodriquez* and subsequent decisions as well of this Court I think make clear that the complete loss of the right to appeal is a form of prejudice that will entitle you to relief, collateral or otherwise, without regard to whether you in fact have presently established that you have meritorious claims.").

committed in *Rodriquez*. The petitioner in *Lozada* made allegations similar to those in the instant case: that his attorney had "failed to inform him of his right to appeal, of the procedures and time limitations for an appeal and of his right to appointed counsel." 498 U.S. at 430. As in *Rodriquez*, the Ninth Circuit held that relief under Section 2255 should be denied, and thus denied a certificate of probable cause, because the petitioner had not demonstrated that the frustrated appeal might have succeeded. 498 U.S. at 431. Again, this Court reversed, indicating that such a showing of prejudice was not required under *Strickland* and that several other courts of appeals had been properly following *Rodriquez*. *Lozada*, 498 U.S. at 431-32.

On remand the Ninth Circuit conformed its practice to *Rodriquez*, holding that "prejudice is presumed under *Strickland* if it is established that counsel's failure to file a notice of appeal was without the petitioner's consent." *Lozada v. Deeds*, 964 F.2d 956, 958 (9th Cir. 1991). *Lozada* itself involved a failure to appeal following a trial. Then, in *United States v. Stearns*, 68 F.3d 328, 329-30 (9th Cir 1995), and again in the instant case (Pet. App. A-1 to A-2), the Ninth Circuit held that the same presumption of prejudice should be applied where a defendant was denied the right to counsel on appeal of issues that arose out of a guilty plea or subsequent sentence. Each such holding is entirely consistent with and in fact compelled by *Rodriquez*.

Petitioner does not dispute the Ninth Circuit's conclusion that the presumed prejudice rule in *Stearns* was merely an application of the presumed prejudice rule in *Lozada*. Rather, petitioner attacks the Ninth Circuit's reliance on *Lozada* itself, objecting that circuit court case law can never by itself provide the "precedent" required by *Teague v. Lane*, 489 U.S. 288 (1989). This argument is for several reasons unavailing.

First, petitioner does not complain that *Lozada* itself was a "new rule". The Ninth Circuit in *Lozada* thought the result in that case was required by the now thirty year old decision in *Rodriquez*; petitioner does not contend otherwise. No less importantly, petitioner did not contend in its briefs in the Ninth Circuit that application of the *Lozada* presumed prejudice rule would violate *Teague*; petitioner's sole *Teague* argument was directed at the issue of whether there had been an underlying violation. (Appellees' Supplemental Brief at pp. 35-43). In short, petitioner at most objects to the methodology utilized in the *Teague* analysis in *Ortega* and followed in this case, but not to the actual conclusion reached.

Second, petitioner's contention that a clear precedent can be established under *Teague* only by a decision of this Court is patently inconsistent with this Court's decision in *United States v. Lanier*, 520 U.S. 259 (1997). In *Lanier*, the Sixth Circuit had held that the clarity of precedent required by the Due Process Clause for a criminal prosecution could be established only by a decision of this Court. The standard of clarity required for the criminal prosecution of Judge Lanier was assuredly greater than the clarity required by *Teague*. Nevertheless, this Court unanimously reversed the Sixth Circuit's ruling, and held that a decision by this Court is not required either to meet the requirement of Due Process or to defeat a claim of qualified immunity. As the Court in *Lanier* acknowledged, where the answer to a question of constitutional law is sufficiently obvious it is unlikely that this Court will have occasion to consider the question because the district courts and courts of appeals will arrive at a consensus, making review by writ of certiorari inappropriate. *See* 520 U.S. at 271 ("[t]he easiest cases don't even arise"); Supreme Court Rule 10(a).

Just such a consensus exists with regard to the applicability of the presumed prejudice rule to cases in which a habeas petitioner was denied the assistance of counsel to

pursue a direct appeal. This Court noted in *Lozada* that two circuits already adhered to that view. *See* 498 U.S. at 432 (citing *Abels v. Kaiser*, 913 F.2d 821, 823 (10th Cir. 1990), and *Estes v. United States*, 883 F.2d 645, 649 (8th Cir. 1989)). That rule is firmly in place in the Eighth[6] and Tenth[7] Circuits, as well as in the First[8], Second[9], Fourth[10], Sixth[11], and Seventh[12] Circuits. Indeed, the Ninth Circuit itself recently noted: "It appears that every federal court of appeals to address the issue has applied some form of a rule of presumed prejudice where counsel fails to file a notice of appeal." *Canales v. Roe*, 151 F.3d 1226, 1229 (9th Cir. 1998). Thus, while the Ninth Circuit in this case and in *Ortega* may have relied on its own case law in applying *Teague*, that methodology was not dispositive.

Finally, any possible dispute about the significance of this methodology has largely been overtaken by other events. The Anti-Terrorism and Effective Death Penalty Act of 1996 has amended 28 U.S.C. § 2254(d) to limit habeas relief to state court rulings that are "contrary to . . . Federal law, *as determined by the Supreme Court of the United States*." (Emphasis added). This legislative change is inapplicable to the instant case, which was filed before the effective date of the AEDPA. *Lind v. Murphy*, 521 U.S. 320 (1997). But the

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[6] *See Williams v. Lockhart*, 849 F.3d 1134, 1137 n.3 (8th Cir. 1988).

[7] *See Romero v. Tansy*, 46 F.3d 1024, 1030-31 (10th Cir.), *cert. denied*, 515 U.S. 1148 (1995); *United States v. Davis*, 929 F.2d 554, 557 (10th Cir. 1991).

[8] *Bonneau v. United States*, 961 F.2d 17, 18, 22 (1st Cir. 1992).

[9] *Morales v. United States*, 143 F.3d 94, 96-97 (2d Cir. 1998).

[10] *United States v. Peak*, 992 F.2d 39, 41-42 (4th Cir. 1993).

[11] *Ludwig v. United States*, 162 F.3d 456, 459 (6th Cir. 1998).

[12] *Fern v. Gramley*, 99 F.3d 255, 256-60 (7th Cir. 1995); *Castellanos v. United States*, 26 F.3d 717, 720 (7th Cir. 1994).

Ninth Circuit has applied this provision of the AEDPA to habeas proceedings commenced after that date. *See Canales*, 151 F.3d at 1229-31. In habeas proceedings, therefore, it appears that the rule proposed by petitioner in this case has already been adopted by statutory amendment.

CONCLUSION

For the above reasons, the petition should be denied.

Dated: April 12, 1999

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No. 98-1473

In The

Supreme Court of the United States

MICHAEL CARRILLO, WARDEN,

Petitioner,

v.

ADRIAN SALMON,

Respondent.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENT TO RESPONDENT'S BRIEF IN OPPOSITION

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On May 3, 1999, this Court granted certiorari with regard to the second Question Presented in *Roe v. Ortega*, No. 98-1441. The second Question Presented in the instant case is the same as that in *Roe v. Ortega*. We submit this Supplement to set forth our views regarding the appropriate disposition of the instant case in light of the Court's action in *Roe v. Ortega*.

Given that ruling, we suggest that the Court grant certiorari limited to the second Question Presented in the instant case. The general issue common to both this case and *Roe v. Ortega* is whether and under what circumstances an attorney has an obligation under the Sixth Amendment to file a notice of appeal following entry of judgment pursuant to a guilty plea or similar disposition. That issue, however, necessarily arises in a wide variety of factual contexts posing somewhat different problems and with possibly differing outcomes.

The circumstances of the instant case differ in a number of important respects from those in *Roe v. Ortega*. (1) At the last trial court proceeding in the instant case respondent Salmon expressly objected to the court's disposition of his case, putting the court and counsel on notice that he would presumably want to appeal the disposition to which he had objected. No similar objection was voiced at the last trial court proceeding in *Roe v. Ortega*. (2) Respondent Salmon actually filed a timely pro se notice of appeal; rather than appointing counsel to represent him, the California court responded by advising him of additional steps he was required to take to proceed pro se. The pro se notice of appeal filed by respondent Roe was untimely. (3) It was not until well after his last court appearance, and after he had been taken to a prison far from that court, that respondent Salmon realized that his attorney had decided not to file a motion to withdraw his plea; at that juncture respondent Salmon was no longer in contact with the attorney in question.

The Sixth Amendment obligations of counsel to pursue an appeal following a guilty plea will necessarily vary with the underlying circumstances. This Court will be better able to clarify the constitutional requirements, and to provide definitive guidance regarding this issue, if it considers and resolves the application of the Sixth Amendment in several distinct cases. The fact-specific nature of similar constitutional issues, such as when a party has given valid consent to a search[1], or when a defendant has waived his right to counsel at the trial court[2], have in the past been explored in a series of cases spanning several decades. The administration of justice would be better served, where possible, by addressing such an issue in several cases during the same Term.

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[1] *Ohio v. Robinette*, 519 U.S. 33 (1996); *Florida v. Bostick*, 501 U.S. 429 (1991); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Thompson v. Louisiana*, 447 U.S. 649 (1980); *Washington v. Chrisman*, 455 U.S. 1 (1982); *Walter v. United States*, 447 U.S. 649 (1980); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Lo-Ji Sales v. New York*, 442 U.S. 319 (1979); *United States v. Watson*, 423 U.S. 411 (1976); *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

[2] *Godinez v. Smith*, 509 U.S. 389 (1993); *Edwards v. Arizona*, 451 U.S. 477 (1981); *Estelle v. Smith*, 451 U.S. 454 (1981); *Brewer v. Williams*, 430 U.S. 387 (1977); *Faretta v. California*, 422 U.S. 806 (1975); *Boyd v. Dutton*, 405 U.S. 1 (1972).

Dated: May 6, 1999

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